

REMARKS/ARGUMENTS

Subject Matter Previously Indicated to be Allowable and Interview Summary

In view of Examiner's previous indication of allowability of all pending claims, Applicant respectfully objects to the instant Action. Applicant also respectfully objects to the absence of any official indication or explanation of what transpired in the prosecution of the instant application in the interim between the Final Office Action of February 23, 2005 and the Office Action of June 16, 2005. It should be noted that Applicant incurred significant expense associated with paying additional claim fees in reliance on the Examiner's indication of allowable subject matter that original dependent claims 4, 5, 8 – 10, 13, 14, 16, and 17 were allowable if rewritten in independent form. It should also be noted that the June 16, 2005 Office Action does not contain any mention of the Examiner's telephone interview with the undersigned that was initiated by the Examiner on June 10, 2005. Accordingly, Applicant respectfully requests entry of the following information in the file to provide a complete and accurate record of the prosecution of the instant application.

It is the obligation of the undersigned to report that the Examiner informally mentioned during the Examiner's telephone interview, that during final review his Supervising Examiner decided to read some of the previously cited references with increased breadth and that the result of the broader interpretation of the references was that some of the previously allowable claims were no longer allowable. Examiner Deuble suggested that the now unallowable claims could be made allowable if the undersigned agreed to amend the claims at issue by adding a not-

insignificant limitation to the claims via Examiner's amendment. The undersigned did not agree to the proposed modification of the claims.

STATUS OF THE CLAIMS

Claims 18-28 are pending in the application. Following the Office Action mailed June 16, 2005, claims 23, 24, and 26 have been allowed. Claims 18-22 and 25 stand rejected. Claim 18 was objected to for non-compliance with formalities. Claims 1 – 17 have been cancelled. Claims 27 and 28 are new.

Claim 18 has been amended to correct the typographical error noted on Page 2 of the June 16, 2005 Office Action. Applicant respectfully submits that the amendment to claim 18 obviates the basis for the standing objection to the claim and requests withdrawal of same.

The instant amendment and the following remarks are believed to be fully responsive to the Office Action. Thus, all of the pending claims are believed to be patentable over the cited references. Applicant respectfully requests that a timely Notice of Allowance be issued in this case. In view of the foregoing arguments, Applicant respectfully requests allowance of claims 18 - 28.

CLAIM REJECTIONS – 35 U.S.C. § 102(b)

Claims 18, 20, 22 and 25 stand rejected under 35 U.S.C. §102(b) as being anticipated by United States Patent No. 5,217,104 to Pelletier (hereinafter referred to as "Pelletier"). In light of the following remarks, Applicant respectfully submits that these claims are allowable.

Initially, Applicant notes that it is axiomatic that to qualify as an anticipation under Section 102, the cited reference must "bear within its four corners adequate directions for the

practice of the patent invalidated.” (See, for example, Dewey & Almay Chemical Co. v. Mimex Co., Inc., 52 U.S.P.Q. 138 (2nd Cir. 1942)). Applicant respectfully submits that Pelletier embody no such directions.

The Pelletier Reference

The Pelletier reference shows a device for deviating objects moving on a conveyor (13) in a direction (F) has a deflecting arm (1) passing from an inactive position to an active position in which it is transverse to the conveyor (13) by a combined movement during which it moves in the same direction (F) as the conveyor (13) while pivoting on itself. The **device has two arms (1, 2)** articulated one on the other--a first, deflecting (1), articulated at the end (8) of a second, carrying arm (2). The second arm (2) is directed in an opposite sense to the displacement (F) of the conveyor (13), being carried by a vertical drive shaft (12), situated on the side of the conveyor (13), this shaft driving it in rotation either in one direction or in the other. The end (1a) of the first arm (1) is guided in a track (3, 4) forcing it to move along the conveyor (13).

Claim 18

Amended claim 18 recites “[a]n ejector for use in a product determination and separation line, the line including a conveyor for transferring a product from a first location, said ejector comprising: a flipper arm; an actuator for rotating said flipper arm around an axis substantially perpendicular to the conveyor direction; and a support for locating said flipper arm and said actuator above a surface of the conveyor, wherein said support comprises a first member being adapted to fixedly attach to a frame of said conveyor and a second member being adapted to pivotably attach via a releasable connection to said first member.”

According to page 2 of the Office Action, Pelletier discloses "a flipper arm 1 and an actuator 2 for rotating the flipper arm about a moving vertical axis that is perpendicular to the conveyor direction." Applicant respectfully submits that items 1 and 2 of the Pelletier reference do not disclose the feature of "an actuator for rotating said flipper arm" as recited in claim 18. According to column 3, lines 7-9 of the Pelletier specification, item 1 is described as a deflecting arm and **item 2 is described as a carrying arm**. Thus, item 2 of the Pelletier reference does not disclose the feature of an actuator, much less an actuator for rotating a flipper arm.

According to page 4 of the Office Action dated June 30, 2004, "[t]he ejector comprises a flipper arm 1, an actuator 5 for rotating the flipper arm, and a support 9 which positions the flipper arm and the actuator above a surface of the conveyor . . ." Applicant respectfully submits that the motor of the Pelletier apparatus is not an actuator as recited in claim 18. In fact, the Pelletier apparatus requires that the motor 5 be combined with a linkage system in order to provide the function of an actuator. According to the Pelletier specification, the arms 1,2 rely on a crank 6 which when driven in rotation by the motor 5, connecting rod 7 is urged in an alternating movement which it transmits to connecting rod 11 which drives shaft 12 in rotation now in one direction, now in the other does not. Thus, the Pelletier motor is not the actuator of claim 18.

Amended claim 18 further recites "a support for locating said flipper arm above a surface of the conveyor to at least partially overlap a belt of the conveyor when said flipper arm is in a non-activated position, wherein said **flipper arm is positioned below said actuator**." Applicant respectfully submits that Pelletier does not disclose the aforementioned feature. Even assuming *arguendo*, that motor 5 of the Pelletier reference does disclose an actuator, FIGS. 1-8 clearly show

both the deflecting and carrying arm mounted **above** the motor. Thus, Pelletier does not disclose the feature of a flipper arm positioned below an actuator.

Even assuming *arguendo*, that the motor 5 of the Pelletier reference by itself did disclose an actuator as recited in claim 18, the Pelletier reference FIGS. 1-8 clearly show both the deflecting and carrying arms mounted **above** the motor. As noted above, claim 18 recites the feature of a support where the **flipper arm is positioned below said actuator**. Thus, Pelletier does not disclose the feature of a flipper arm positioned **below** an actuator. For at least the foregoing reasons, Pelletier does not anticipate amended claim 18.

Claim 20

Claim 20 recites "[a]n ejector for use in a product determination and separation line, the line including a conveyor for transferring a product from a first location, said ejector comprising: a flipper arm; an actuator for rotating said flipper arm; and a support for locating said flipper arm above a surface of the conveyor to at least partially overlap a belt of the conveyor when said flipper arm is in a non-activated position, wherein said support comprises a first member being adapted to fixedly attach attached to a frame of said conveyor and a second member being adapted to pivotably attach via a releasable connection to said first member, **wherein said flipper arm is positioned below said actuator.**"

For the reasons stated above, the motor 5 by itself does not disclose the feature of an actuator as recited in the aforementioned claim. As also stated above, Pelletier does not disclose the feature of a flipper arm positioned below the actuator. Even assuming *arguendo*, that motor 5 of the Pelletier reference does disclose an actuator, FIGS. 1-8 clearly show both the deflecting and carrying

arm mounted **above** a motor. Thus, Pelletier does not disclose the feature of a flipper arm positioned **below** an actuator.

Claim 22 depends from independent claim 20 and is allowable over the Pelletier reference for at least the same reasons as claim 20. Therefore, Applicant respectfully requests withdrawal of the standing rejection to claims 20 and 22 and allowance of same.

Claim 25

Claim 25 recites "[a]n ejector for use in a product determination and separation line, the line including a conveyor for transferring a product from a first location, said ejector comprising: a flipper arm; an actuator for rotating said flipper arm; and **a support for locating said flipper arm and said actuator above a surface of the conveyor**, wherein said support comprises a first member being adapted to adjustably attach to a frame of said conveyor and a second member being adapted to attach via a releasable hinged connection to said first member."

Pelletier does not disclose the feature of a "a support for locating said flipper arm and said actuator above a surface of the conveyor." FIGS. 1-8 of the Pelletier reference does not show a **support** for locating a flipper arm **and** an actuator above a surface of a conveyor. Assuming that motor 5 discloses an actuator, at best, the reference shows a support for locating the deflecting and carrying arms above a surface of a conveyor. The Pelletier reference does not disclose positioning a motor above a surface of the conveyor, nor does the reference disclose a support for positioning a motor above a surface of a conveyor. Thus, the Pelletier reference does not disclose the feature of "a **support** for locating said flipper arm **and said actuator** above a surface of the conveyor."

For at least the foregoing reasons, the Pelletier reference does not anticipate claim 25.

CLAIM REJECTIONS – 35 U.S.C. § 103(a)

Claims 18-22 and 25 stand rejected under 35 U.S.C. §103(a) as being obvious over United States Patent No. 5,217,104 to Pelletier in view of United States Patent No. 4,595,091 to Scopatz *et al* (hereinafter referred to as “Scopatz”).

The Examiner bears the initial burden of factually supporting any prima facie conclusion of obviousness. *MPEP* §2142. To establish a prima facie case of obviousness, three criteria must be met. First, there must be some suggestion or motivation, to modify the references or to combine reference teachings. Second, there must be reasonable expectation of success. Finally, the prior art must teach all the claim limitations. *MPEP* §2142. In light of the argument regarding the Pelletier and Scopatz references, the aforementioned references alone or in combination do not teach or suggest all the claim limitations of the present application.

Applicant respectfully points to the final prong of the test, which states the prior art must teach all the claim limitations.

The Pelletier Reference

The Pelletier reference shows a device for deviating objects moving on a conveyor (13) in a direction (F) has a deflecting arm (1) passing from an inactive position to an active position in which it is transverse to the conveyor (13) by a combined movement during which it moves in the same direction (F) as the conveyor (13) while pivoting on itself. The device has two arms (1, 2) articulated one on the other--a first, deflecting (1), articulated at the end (8) of a second, carrying arm (2). The second arm (2) is directed in an opposite sense to the displacement (F) of the conveyor (13), being carried by a vertical drive shaft (12), situated on the side of the conveyor (13), this shaft driving it in

rotation either in one direction or in the other. The end (1a) of the first arm (1) is guided in a track (3, 4) forcing it to move along the conveyor (13).

The Scopatz Reference

The Scopatz reference shows a diverter apparatus for rapidly and gently diverting articles, typically fruit, from a moving conveyor. The Scopatz apparatus comprises an ejector lever member, an air cylinder assembly, and a stationary ejector lever mount, the two former sharing a common pivot point while each of the two is pivotable with respect to each other while pivoting on pivot pins mounted to the stationary mount. FIGS. 2 and 3 of the Scopatz reference show an ejector lever that rotates around an axis that is parallel to the direction of conveyor roller travel. Scopatz also shows a diverter linkage with at least three mounting points where an actuator pivotably mounted to the ejector lever intermediate to the end of the ejector lever.

Pelletier in view of Scopatz

As discussed above, at the very least, the Pelletier reference does not teach all of the limitations of independent claims 18, 20, and 25 because of the arguments set forth *supra* regarding the Pelletier reference in the anticipation section of this response. Additionally, Applicant respectfully submits that the statements found on page 3 of the Office Action fail to establish a *prima facie* case of obviousness for a number of reasons, not the least of which is that the lack of any suggestion or motivation, to modify the references or to combine reference teachings.

In view of the foregoing statements, the aforementioned references alone or in combination do not teach or suggest all the claim limitations of the present application. Thus, claims 18-22 and 25 are allowable and non-obvious over the cited references. In light of the foregoing argument, Applicant respectfully requests withdrawal of the standing rejection to Claims 18-22 and 25 as being anticipated by Pelletier or, in the alternative, as obvious over Pelletier in view of Scopatz. Claims 27 and 28 are not anticipated or obvious over the Pelletier and/or Scopatz references because neither reference, alone or in combination, contains all of the recited features of claims 27 and 28.

If there are any matters which can be clarified by telephone, the Examiner is requested to contact the undersigned attorney. If there are any fees due in connection with the filing of this response, the Office is authorized to charge same to Deposit Account No. 50-0354.

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Attachments